

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROXANN BROWN and MICHELLE
SMITH, on their own behalf of others
similarly situated,

Plaintiffs,

v.

OLD NAVY, LLC; OLD NAVY
(APPAREL), LLC; OLD NAVY
HOLDINGS, LLC; GPS SERVICES,
INC.; and THE GAP, INC., inclusive,

Defendants.

No.

**NOTICE OF REMOVAL OF ACTION TO
FEDERAL COURT**

Removed From King County Superior Court
(Case No.: 23-2-07103-4 Sea)

[28 U.S.C. §§ 1332(a), 1441, 1446 and 1453]

**TO: THE CLERK OF COURT FOR THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON**

AND TO: PLAINTIFFS AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT, Defendants Old Navy, LLC; Old Navy (Apparel),
LLC; Old Navy Holding, LLC¹; GPS Services, Inc.; and The Gap, Inc. (collectively, “Old
Navy”), by and through counsel, hereby remove the above-entitled action from the Superior
Court of the State of Washington in and for King County to the United States District Court for
the Western District of Washington, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453

¹ Old Navy Holdings, LLC is improperly sued. The former entity Old Navy (Holdings), LLC no longer exists and
was merged into Old Navy, LLC as of February 4, 2007. *See* Ex. C.

1 because (1) complete diversity exists between the parties, and (2) removal is proper pursuant to
 2 the Class Action Fairness Act (“CAFA”). Old Navy denies the allegations and relief sought, and
 3 files this Notice without waiving any defenses, exceptions, or obligation that may exist in its
 4 favor. Old Navy will provide additional evidence to support the allegations of this pleading as
 5 required in the event a challenge is raised to the Court’s jurisdiction.

6 **I. PROCEDURAL BACKGROUND**

7 1. On April 19, 2023, Plaintiffs Roxann Brown and Michelle Smith filed a
 8 Complaint in King County Superior Court (the “Complaint”). A true and correct copy of the
 9 Complaint is attached as **Exhibit A**.

10 2. On April 26, 2023, Plaintiffs served copies of the Summons and Complaint, on
 11 the registered agents for Old Navy, LLC; Old Navy (Apparel), LLC; Old Navy Holding, LLC;
 12 GPS Services, Inc.; and The Gap, Inc. Copies of these documents are attached hereto as **Exhibit**
 13 **B**.

14 3. Plaintiffs allege that Old Navy violated Washington’s Commercial Electronic
 15 Mail Act (“CEMA”) and the Consumer Protection Act (“CPA”) by sending marketing emails to
 16 Washington consumers with false and misleading subject lines. Compl. ¶ 4. 4. Plaintiffs seek
 17 statutory and exemplary damages, injunctive relief, and attorneys’ fees and costs. Compl. ¶ 6.

18 5. As alleged in the Complaint, the two Plaintiffs are both citizens of Washington,
 19 and bring this action on behalf of persons residing in Washington. Compl. ¶¶ 7–8

20 **II. REMOVAL IS TIMELY**

21 6. Plaintiffs served the registered agents for Old Navy on April 26, 2023. Thirty
 22 days from service of the Summons and Complaint therefore falls on Friday, May 26, 2023.
 23 Because this Notice is filed within thirty days from service, it is timely under 28 U.S.C. §§
 24 1446(b) and 1453. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354
 25 (1999). No previous Notice of Removal has been filed or made with this Court for the relief
 26 sought herein.
 27

1 **III. VENUE**

2 7. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446(a)
3 because the United States District Court for the Western District of Washington embraces the
4 place where this action is pending, King County Superior Court.

5 **IV. DIVERSITY JURISDICTION**

6 8. This is a civil action over which this Court has jurisdiction under 28 U.S.C. § 1332
7 because, upon information and belief, complete diversity of citizenship exists between the parties
8 and the amount in controversy exceeds \$75,000 for each named Plaintiff, exclusive of interests
9 and costs.

10 9. “An individual is a citizen of the state in which he is domiciled” *Boon v.*
11 *Allstate Ins. Co.*, 229 F. Supp. 2d 1016, 1019 (C.D. Cal. 2002) (citing *Kanter v. Warner-Lambert*
12 *Co.*, 265 F.3d 853, 857 (9th Cir. 2001)). For purposes of diversity of citizenship jurisdiction,
13 citizenship is determined by the individual’s domicile at the time that the lawsuit is filed.
14 *Armstrong v. Church of Scientology Int’l*, 243 F.3d 546, 546 (9th Cir. 2000) (citing *Lew v. Moss*,
15 797 F.2d 747, 750 (9th Cir. 1986)). Domicile is determined by “an individual’s 1) residence in
16 a state, and 2) his intent to remain indefinitely.” *Boon*, 229 F. Supp. 2d at 1019. Evidence of
17 continuing residence creates a presumption of domicile. *Washington v. Hovens LLC*, 652 F.3d
18 340, 395 (3d Cir. 2011); *State Farm Mut. Auto. Ins. Co. v. Dyer*, 19 F.3d 514, 519 (10th Cir.
19 1994).

20 10. In their Complaint, Plaintiffs allege they reside in Pierce County, Washington and
21 Clark County, Washington. Compl. ¶¶ 7–8. Plaintiffs also allege they are citizens of the State
22 of Washington. Compl. ¶¶ 7–8. Accordingly, Plaintiffs were and are domiciled in Washington
23 and are citizens of the State of Washington for purposes of removal.

24 11. For purposes of establishing diversity jurisdiction, a corporation is deemed to be
25 a citizen of any state in which it has been incorporated and of the state where it has its principal
26 place business. 28 U.S.C. § 1332(c)(1). The “principal place of business” for the purpose of
27 determining diversity subject matter jurisdiction refers to “the place where a corporation’s

1 officers direct, control, and coordinate the corporation's activities . . . [I]n practice it should
 2 normally be the place where the corporation maintains its headquarters-provided that the
 3 headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,'
 4 and not simply an office where the corporation holds its board meetings." *Hertz Corp. v. Friend*,
 5 559 U.S. 77, 92–93 (2010).

6 12. A Limited Liability Company ("LLC") is a citizen, for diversity purposes, of
 7 every state of which its owners/members are citizens. *Johnson v. Columbia Properties*
 8 *Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

9 13. Defendant GPS Services, Inc. ("GPS Services") is organized under the laws of
 10 the State of California. GPS Services' principal place of business and corporate headquarters is
 11 in San Francisco, California, where its officers, direct, control, and coordinate corporate
 12 activities. GPS Services is not and has never been organized under the laws of the State of
 13 Washington, nor are its headquarters, executive offices, or officers based in Washington.

14 14. Defendant The Gap, Inc. ("Gap") is organized under the laws of the State of
 15 Delaware. Gap's principal place of business and corporate headquarters is in San Francisco,
 16 California, where its officers, direct, control, and coordinate corporate activities. Gap is not and
 17 has never been organized under the laws of the State of Washington, nor is its headquarters,
 18 executive offices, or officers based in Washington.

19 15. Defendant Old Navy, LLC is a limited liability company. The Gap, Inc. is the
 20 sole owner/member of Old Navy, LLC. As explained above, Gap is incorporated in the State of
 21 Delaware and its principal place of business is in the State of California.² Therefore, Old Navy,
 22 LLC is a citizen of the States of Delaware and California.

23 16. Defendant Old Navy (Apparel), LLC ("Old Navy (Apparel)") is a limited liability
 24 company. GPS Services, Inc. is the sole owner/member of Old Navy (Apparel). As explained
 25 above, GPS Services is incorporated and has its principal place of business is in the State of
 26 California. Therefore, Old Navy (Apparel), LLC is a citizen of the State of California.

27 ² As also explained above, misnamed Defendant Old Navy (Holdings), LLC merged into Old Navy, LLC.

17. There is complete diversity pursuant to 28 U.S.C. §§ 1332(a) and 1441(b) because this is a civil action between citizens of different states.

18. The amount in controversy requirement is also satisfied because Plaintiffs' Complaint is seeking an amount that is in excess of \$75,000 for each named Plaintiff. Here, Plaintiffs request (1) statutory damages³ in the amount of \$500 for each alleged violation of CEMA pursuant to RCW 19.190.020(1)(b); (2) treble damages pursuant to RCW 19.86.090; and (3) costs and attorneys' fees in connection with this litigation, pursuant to RCW 19.86.090.

19. A removing party need only show a "plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). The amount in controversy can include actual damages, punitive damages, and attorney's fees authorized by contract or statute. *See Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Attorney's fees are properly included in determining the amount in controversy. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 698 (9th Cir. 2007); *Fritsch v. Swift Transp. Co. of Arizona, LLC*, 899 F.3d 785, 794 (9th Cir. 2018) (holding that "if a plaintiff would be entitled under a contract or statute to future attorney's fees, such fees are at stake in the litigation and should be included in the amount in controversy").

20. According to Plaintiffs, an injury occurs each time an email containing false or misleading information in the subject line is sent to a Plaintiff. Compl. ¶¶ 5, 22. Plaintiffs allege that they have each identified at least 40 emails from Old Navy "with false and misleading subject lines currently in their mailboxes." Compl. ¶ 90:16–17. Plaintiffs also allege they each have between 614 and 1,243 emails from Old Navy in their inboxes currently, and they have not foreclosed seeking statutory damages for an as-yet unidentified, additional number of those emails. Compl. ¶¶ 76, 84. If a single Plaintiff were to seek statutory damages for even 150 emails (at \$500/email), that alone (without accounting for treble damages, actual damages, injunctive relief, and attorney's fees) would exceed the \$75,000 threshold. Moreover, Plaintiffs

³ Defendants dispute that Plaintiffs can seek statutory damages under the terms of CEMA and the Consumer Protection Act. Nevertheless, because this is a disputed issue, Plaintiffs' claims for statutory damages are appropriately included within the amount in controversy.

1 also state that they cannot identify all the emails received, as some have been deleted, and allege
2 that discovery will show the “full number of illegal spam emails” over time. Compl. ¶ 90:10–
3 23. Thus, even based on the Plaintiffs’ bare estimations of the actionable emails they allegedly
4 received from Old Navy and the promise for more through discovery, their Complaint puts at
5 issue statutory damages exceeding the \$75,000 threshold for the amount-in-controversy.

6 21. In addition, Plaintiffs seek treble damages (which are capped at \$25,000), and
7 attorney’s fees pursuant to RCW 19.86.090. *See* Compl. ¶ 115. Thus, the \$75,000 threshold is
8 also met even if Plaintiffs only seek statutory damages for 40 emails apiece (a limit to which they
9 have *not* committed). If each Plaintiff sought \$500 per email for 40 emails, plus \$25,000 in treble
10 damages, that would bring the total alleged statutory and treble damages to \$45,000 per Plaintiff.
11 And, in separate litigation, attorneys from the law firm representing Plaintiffs have sought an
12 hourly rate of \$550 for partners. *See infra* ¶ 38. At that rate, Plaintiffs’ counsel would only need
13 to incur 55 hours of attorney time (not even accounting for any other fees and costs) to push the
14 total amount-in-controversy above \$75,000. It is readily apparent that Plaintiff’s counsel’s fees
15 will exceed that amount over the course of this litigation. Indeed, if this case were to proceed all
16 the way through trial, it is readily apparent that Plaintiff’s counsel’s fees would exceed the
17 \$75,000 threshold standing alone. Because the CPA authorizes an award of attorney’s fees, RCW
18 19.86.090, those fees must be taken into account in determining the amount-in-controversy for
19 purposes of removal. *See, e.g., Fritsch*, 899 F.3d at 794 (“We conclude . . . that a court must
20 include future attorneys’ fees recoverable by statute or contract when assessing whether the
21 amount-in-controversy requirement is met.”).

22 22. For the foregoing reasons, the amount in controversy requirement is easily
23 satisfied because each Plaintiff’s alleged statutory damages, treble damages, and attorney’s fees
24 place more than \$75,000 in controversy.

25 23. Based on the foregoing, this Court has jurisdiction over this matter pursuant to 28
26 U.S.C. § 1332, and this action is properly removed to this Court.

V. **ALTERNATIVELY, THE COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION UNDER CAFA**

24. This lawsuit is a putative class action.⁴ In addition to diversity jurisdiction, removal is also proper pursuant to CAFA and 28 U.S.C. §§ 1441, 1446, and 1453, because: (i) diversity of citizenship exists between at least one putative class member and Defendants; (ii) the aggregate number of putative class members in the proposed class is 100 or greater; and (iii) the Complaint places in controversy more than \$5 million, exclusive of interest and costs. 28 U.S.C. §§ 1332(d)(2), (d)(5)(b), 1453. Old Navy denies Plaintiffs’ factual allegations and denies that Plaintiffs—or the class they purport to represent—are entitled to the relief requested in the Complaint. Nevertheless, based on Plaintiffs’ allegations in the Complaint and Prayer of Relief, all requirements for jurisdiction under CAFA have been met in this case.

A. **Diversity of Citizenship Exists.**

25. To establish CAFA’s diversity requirement, a party seeking removal must establish only that minimal diversity exists, *i.e.*, that one putative class member is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1090-91 (9th Cir. 2010) (finding that to achieve its purposes, CAFA provides expanded original diversity jurisdiction for class actions meeting the minimal diversity requirement set forth in 28 U.S.C. § 1332(d)(2)).

26. As explained above, there is complete diversity pursuant to 28 U.S.C. §§ 1332(a) and 1441(b), because this is a civil action between citizens of different states. *See supra* ¶¶ 13–16. Accordingly, the minimal diversity requirement of CAFA is also satisfied.

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⁴ Old Navy denies that class certification is appropriate and reserves the right to contest class certification at the appropriate time.

B. The Putative Class Has More Than 100 Members.

27. CAFA’s requirement that proposed class membership be no less than 100 (28 U.S.C. § 1332(d)(5)) is satisfied here because Plaintiffs allege in their Complaint that “the Class has more than 1,000 members.” Compl. ¶¶ 14, 92.

C. The Amount in Controversy Exceeds \$5,000,000.⁵

28. Pursuant to CAFA, the claims of the individual members in a class action are aggregated to determine if the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(6). Because Plaintiffs do not expressly plead a specific amount of damages, a removing party need only show that it is more likely than not that the amount in controversy exceeds \$5 million. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997).

29. A removing defendant “must file in the federal forum a notice of removal ‘containing a short and plain statement of the grounds for removal.’” *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 87 (2014) (quoting 28 U.S.C. § 1446(a)). The short and plain statement “need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Id.* at 89. It is beyond dispute that “a removing defendant’s notice of removal need not contain evidentiary submissions but only plausible allegations of the jurisdictional elements.” *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 922 (9th Cir. 2019) (internal citations omitted); *see also Dart Cherokee*, 574 U.S. at 84 (holding that a “statement ‘short and plain’ need not contain evidentiary submissions”); *Jauregui v. Roadrunner Transp. Servs., Inc.*, 28 F.4th 989, 993 (9th Cir. 2022) (reversing district court’s order remanding the

⁵ This Notice of Removal addresses the nature and amount of damages that the Complaint places in controversy. Old Navy refers to specific damages estimates and cites to comparable cases solely to establish that the amount in controversy exceeds the jurisdictional minimum. Old Navy maintains that each of Plaintiffs’ claims lack merit and that Old Navy is not liable to Plaintiffs or any putative class member in any amount whatsoever. No statement or reference contained herein shall constitute an admission of liability or a suggestion that Plaintiffs will or could actually recover any damages based upon the allegations contained in the Complaint or otherwise. “The amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of [Old Navy’s] liability.” *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010).

1 action to state court due to an ‘inappropriate demand of certitude from [the defendant] over its
2 assumptions used in calculating the amount in controversy’ for purposes of CAFA removal).

3 30. The ultimate inquiry is what amount the complaint places “in controversy,” not
4 what a defendant may actually owe in damages. *LaCross v. Knight Transp. Inc.*, 775 F.3d 1200,
5 1202 (9th Cir. 2015) (citation omitted) (explaining that courts are directed “to first look to the
6 complaint in determining the amount in controversy”); *see also Jauregui*, 28 F.4th at 993 (“At
7 that stage of the litigation, the defendant is being asked to use the plaintiff’s complaint—much
8 of which it presumably disagrees with—to estimate an amount in controversy. This is also at a
9 stage of the litigation before any of the disputes over key facts have been resolved.”). The burden
10 to establish the jurisdictional amount under CAFA “is not ‘daunting,’ as courts recognize that
11 under this standard, a removing defendant is not obligated to ‘research, state and prove the
12 plaintiff’s claims for damages.’” *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205
13 (E.D. Cal. 2008); *see also LaCross*, 775 F.3d at 1203 (rejecting plaintiff’s argument for remand
14 based on the contention that the class may not be able to prove all amounts claimed: “Plaintiffs
15 are conflating the amount in controversy with the amount of damages ultimately recoverable.”);
16 *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1198 n.1 (9th Cir. 2015) (in alleging the amount
17 in controversy, defendants “are not stipulating to damages suffered, but only estimating the
18 damages in controversy.”).

19 31. The allegations in the removing defendant’s notice of removal “may rely on ‘a
20 chain of reasoning that includes assumptions’ and ‘an assumption may be reasonable if it is
21 founded on the allegations of the complaint.’” *Marano v. Liberty Mut. Grp., Inc.*, 2021 WL
22 129930, at *2 (C.D. Cal. Jan. 14, 2021) (*quoting Arias*, 936 F.3d at 925 (9th Cir. 2019)).
23 Moreover, Congress intended for federal jurisdiction to be appropriate under CAFA “if the value
24 of the matter in litigation exceeds \$5 million either from the viewpoint of the plaintiff or the
25 viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive
26 relief or declaratory relief).” Senate Judiciary Report, S. REP. 109-14, at 42. As the United
27 States Supreme Court has advised, “no antiremoval presumption attends [a] case invoking

1 CAFA” because Congress intended to “facilitate adjudication of certain class actions in federal
2 court.” *Dart Cherokee*, 574 U.S. at 87.

3 32. In assessing the amount in controversy, a court must “assume that the allegations
4 of the complaint are true and assume that a jury will return a verdict for the plaintiff on all claims
5 made in the complaint.” *Campbell v. Vitran Exp., Inc.*, 471 F. App’x. 646, 648 (9th Cir. 2012)
6 (citing *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001
7 (C.D. Cal. 2002)). When the complaint is “lacking in factual detail,” a defendant seeking removal
8 is particularly “justified in employing reasonable estimates” to establish the amount in
9 controversy. *Ritenour v. Carrington Mortg. Servs., LLC*, 228 F. Supp. 3d 1025, 1029 (C.D. Cal.
10 2017); *see also Muniz v. Pilot Travel Ctrs. LLC*, 2007 WL 1302504, at *4 (E.D. Cal. May 1,
11 2007) (denying remand where defendant applied reasonable assumptions to complaint that had
12 no fact-specific allegations because a plaintiff seeking to avoid removal “could have alleged facts
13 specific to her claims which would narrow the scope of the putative class or damages sought”).

14 33. While Old Navy denies Plaintiffs’ factual allegations and denies that they or the
15 putative class they seek to represent are entitled to any of the relief for which Plaintiffs have
16 prayed, it is clear that the allegations within the Complaint put more than \$5 million into
17 controversy when aggregating the claims of the putative class members as set forth in 28 U.S.C.
18 § 1332(d)(6).

19 **1. Plaintiffs’ First and Second Causes of Action for Violations of CEMA and**
20 **the CPA Place Over \$5,000,000 in Controversy.**

21 34. In their Complaint, Plaintiffs allege that Defendants sent “dozens of commercial
22 electronic mail messages with false or misleading subject lines to them and the Class,” in
23 violation of CEMA. Compl. ¶5. According to Plaintiffs, “Old Navy may send a single consumer
24 up to five marketing emails per day, and commonly send three marketing emails every day, many
25 of them advertising ‘limited time offers.’” Compl. ¶ 33:4–7. Plaintiffs allege they have each
26 received at least 40 emails from Old Navy “with false and misleading subject lines currently in
27 their mailboxes,” as well as having a combined total of 1,857 emails currently in their inboxes,

1 and they contend that the named Plaintiffs are representative of the class. Compl. ¶ 90:16–17.
 2 Plaintiffs seek statutory damages in the amount of \$500 for each violation of CEMA pursuant to
 3 RCW 19.190.020, *and* treble damages pursuant to RCW 19.86.090. Using Plaintiffs’ alleged
 4 number of deceptive emails per class representative (40 or more per person) and averaging that
 5 number across the class, with an alleged Class of at least 1,000 people and alleged statutory
 6 damages of \$500 per purported violation, the amount-in-controversy in this case easily exceeds
 7 \$5,000,000.

8 **2. Plaintiffs’ Request for Attorneys’ Fees Place Additional Amount in**
 9 **Controversy, Further Exceeding the CAFA Threshold.**

10 35. Plaintiffs also seek recovery of attorneys’ fees pursuant to RCW 19.86.090. *See*
 11 Compl. ¶ 115. Attorneys’ fees are properly included in determining the amount in controversy.
 12 *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 698 (9th Cir. 2007); *Fritsch v. Swift*
 13 *Transp. Co. of Arizona, LLC*, 899 F.3d 785, 794 (9th Cir. 2018) (holding that “if a plaintiff would
 14 be entitled under a contract or statute to future attorney’s fees, such fees are at stake in the
 15 litigation and should be included in the amount in controversy”); *Dawsey v. Travelers Indem.*
 16 *Co.*, Case No. 3:15-cv-05188-RBL, 2015 WL 4394545, at *3 (W.D. Wash. July 16, 2015)
 17 (allowing attorneys’ fees of 25% of compensatory damages to be included in CAFA amount in
 18 controversy calculation). “A defendant does ‘not need to prove to a legal certainty’ that a plaintiff
 19 will be awarded the proffered attorneys’ fees in the removal notice.” *Greene v. Harley-Davidson,*
 20 *Inc.*, 965 F.3d 767, 774 n.4 (9th Cir. 2020) (quoting *Dart Cherokee*, 574 U.S. at 88).

21 36. Old Navy denies Plaintiffs’ claim for attorneys’ fees. However, for purposes of
 22 removal, the Ninth Circuit has held that future fee estimates can be based on “customary rates
 23 and proper fees,” and that “a percentage-based method,” such as 25% of the amount in
 24 controversy, may also be relevant when estimating the amount of fees included in the amount in
 25 controversy. *Fritsch*, 899 F.3d at 795 and 796, fn. 6. Courts have used the 25% benchmark to
 26 calculate potential fees for purposes of the CAFA amount in controversy. *See, e.g., Dawsey*,
 27 2015 WL 4394545, at *2–3 (adding 25 percent benchmark to estimated common fund value);

1 *Berry v. Transdev Services, Inc.*, 2016 WL 11261499, at *4-5 (W.D. Wash. Jan. 11, 2016)
2 (“Courts also recognize that two possible benchmarks for estimating such attorneys’ fees: an
3 estimate under a lodestar calculation or using a 25% common fund benchmark.”). Courts
4 therefore include a potential 25% fee award in the CAFA amount in controversy.

5 37. Even though Old Navy has already demonstrated by a preponderance of the
6 evidence that the amount in controversy exceeds \$5,000,000, above, Old Navy notes that the
7 inclusion of attorneys’ fees would increase the amount in controversy even further above the
8 \$5,000,000 threshold.

9 38. Even if the 25% benchmark is not used, it is reasonable to assume that Plaintiffs’
10 potential future attorneys’ fees place at least an additional \$1,000,000 in controversy. Plaintiffs’
11 attorneys have recently presented to courts in fee motions in class actions that their hourly rate is
12 \$550 for partners, \$325 for an associate, and \$200 for a paralegal. *See Hoffman v. Hearing Help*
13 *Express, Inc. et al.*, No. 3:19-cv-05960-MJP, Dkt. No. 140 (W.D. Wash. Oct. 27, 2021)
14 (presenting Beth Terrell’s hourly rate as \$550 in 2021); *see also Carranza v. Dovex Fruit*
15 *Company*, No. 2:16-cv-00054-SMJ, Dkt. No. 108 (E.D. Wash. Sept. 27, 2018) (granting final
16 approval and approving a \$525 hourly rate for an attorney at Plaintiff’s counsel’s firm in 2019).

17 39. Based on the foregoing rates, and consistent with precedent in other class actions,
18 the preponderance of the evidence shows that attorneys’ fees are likely to increase the amount in
19 controversy by at least \$1,000,000 if this case is litigated through trial, further exceeding the
20 \$5,000,000 threshold for removal under CAFA. *See, e.g., Ibarra v. Wells Fargo Bank, N.A.*,
21 2018 WL 5276295, at *7 (C.D. Cal. Sept. 28, 2018) (awarded \$1,967,253.76 in attorneys’ fees
22 to the plaintiffs following summary judgment in their favor where class counsel had spent
23 1,805.55 hours litigating at rates ranging from \$325 to \$775); *In re Taco Bell Wage and Hour*
24 *Actions*, 222 F. Supp. 3d 813, 847 (E.D. Cal. 2016) (awarding \$1,156,821.12 in fees following
25 trial based on 4,016.74 hours billed and a blended rate of only \$288 per hour).

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D. CAFA's Exceptions to Removal Do Not Apply.

40. CAFA's "home-state" and "local controversy" exceptions do not apply to this removal. The "home state" exception prevents CAFA removal only when all "primary defendants" are citizens of the state in which the action was filed. 28 U.S.C. § 1332(d)(4)(B); *Phillips v. Kaiser Found. Health Plan, Inc.*, 953 F. Supp. 2d 1078, 1086 (N.D. Cal. 2011) ("[Home state] test requires that all 'primary defendants' be residents of the same state in which the action is filed."). Likewise, under the "local controversy exception," at least one defendant must be "a citizen of the State in which the action was originally filed." 28 U.S.C. 1332(d)(4)(A). Here, Plaintiffs brought all claims in the Complaint against Old Navy, LLC; Old Navy (Apparel), LLC; Old Navy Holding, LLC; GPS Services, Inc.; and The Gap, Inc., seeking damages against all Defendants without distinction. *See* Compl., Request for Relief ¶ R. None of the Defendants are citizens of the State of Washington where the action was filed, negating application of the home state and local controversy exceptions. *See supra* ¶ 13–16.

VI. NOTICE

41. Old Navy will promptly serve this Notice of Removal on all parties and will promptly file a copy of this Notice of Removal with the clerk of the state court in which the action is pending, as required under 28 U.S.C. section 1446(d).

VII. CONCLUSION

Based on the foregoing, removal is proper to this Court. If any question arises as to the propriety of the removal of this action, Old Navy respectfully requests the opportunity to conduct jurisdictional discovery, and to present a brief and oral argument in support of its position that this case is subject to removal.

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DATED this 25th day of May, 2023.

NOTICE OF REMOVAL - 13

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CERTIFICATE OF SERVICE

I, Lixi Aylin Colmenero, declare that I am employed by the law firm of Morgan, Lewis & Bockius LLP, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On May 25, 2023, I caused a true and correct copies of the following documents to be served on counsel listed below in the manner indicated:

1. Defendants Old Navy, LLC; Old Navy (Apparel), LLC; Old Navy Holding, LLC; GPS Services, Inc.; and The Gap, Inc's Notice of Removal to Federal Court
2. Defendant's Verification of State Court Records
3. Defendants Old Navy, LLC; Old Navy (Apparel), LLC; Old Navy Holding, LLC; GPS Services, Inc.; and The Gap, Inc's Corporate Disclosure Statement
4. Notice of Filing of Notice of Removal

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- ☐ Via legal messengers
- ☐ Via first class mail
- ☐ Via facsimile
- ☒ Via email
- ☐ Via E-Service

Attorneys for Plaintiffs Roxann Brown & Michelle Smith

DATED this 25th day of May, 2023.

s/ Lixi Aylin Colmenero
Lixi Aylin Colmenero